

# Foes In Missouri River Fight Argue Over New Senate Move

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WASHINGTON -- Both sides are claiming victory in the latest skirmish for control of the Missouri River.

At issue is an attempt by Sen. Kit Bond, R-Mo., to influence the U.S. Army Corps of Engineers as the agency moves toward a new plan for operating dams that control the river's flow.

Bond says an amendment he offered would allow the waterway's managers to sidestep the Endangered Species Act by ignoring demands from the U.S. Fish and Wildlife Service to return the Missouri to a more natural ebb and flow.

But supporters of the flow changes argue the measure would not alter the corps' legal responsibility to protect Missouri River fish and birds that are on the brink of extinction. That is why even Bond's foes, led by Majority Leader Tom Daschle, joined in unanimously approving the language on July 18.

The measure says this: River managers "may consider and propose" alternatives to the Fish and Wildlife Service plan, which calls for releasing more water every third spring and much lower levels every summer.

It also says: The corps "shall consider" other views "to ensure that other congressionally authorized purposes" -- barge traffic, flood control and hydropower -- "are maintained."

Legal minds vary on whether the legislation would have the effect Bond intends, though most agree that the dispute will wind up in court.

On the side of environmental groups is John Leshy, a former Interior Department solicitor who is preparing to teach at University of California's Hastings College of the Law.

"This is kind of a prod to look at other alternatives, but it doesn't weaken the duty on the part of the Corps of Engineers to comply with the Endangered Species Act as it's currently written," Leshy said.

In other words, if the corps veers from the Fish and Wildlife recommendations, Leshy said, "they better have a very good reason for doing so."

The Endangered Species Act prohibits activities that jeopardize species listed as endangered or threatened, and the Fish and Wildlife Service shares responsibility with the National Marine Fisheries Service for administering the 28-year-old law. When other laws conflict with the Endangered Species Act, courts usually rule in

favor of the act.

Washington attorney Gary Baise, who represents farmers in environmental cases, sees some advantage in the amendment. It would not trump the Endangered Species Act, Baise said, but "this is helpful in leveling the playing field."

He means that the measure could push the corps to give equal consideration to the needs of barge traffic, hydropower and flood control, in addition to recovery of the threatened and endangered least tern, piping plover and pallid sturgeon.

Baise, a former official of the Environmental Protection Agency and Justice Department, said, "I would assume one reason this passed 100-0 is that environmentalists believe the Endangered Species Act is in no way trumped by this amendment.

"Others would say the corps is now to give equal treatment to alternatives other than those proposed by the Fish and Wildlife Service," Baise added.

Over the next few weeks, a House-Senate conference committee will decide whether to keep Bond's language, in addition to an outright prohibition against the flow changes passed by the House.

Michael Bean, a specialist for more than two decades on the Endangered Species Act, considers Bond's language "largely innocuous," although he cautions that the second portion concerning various uses of the river is ambiguous.

"My own view is that this language in the second sentence is probably not sufficiently clear that Congress intends to change existing law that Senator Bond can count on that result," Bean said.

"But on the other hand, it is sufficiently nebulous that it at least creates the opportunity for him and his side to argue in the future that Congress did intend to change the law, and change it in a way that removes the Endangered Species Act requirement with respect to this provision," said Bean, who now works for the Washington-based group Environmental Defense, which is lobbying for the flow changes.

As negotiators consider Bond's amendment, along with the House's outright prohibition against the flow changes, the corps is moving ever closer to issuing a new river management proposal, currently scheduled for next month. A period of public comment would follow, with no changes planned before the spring of 2003.

If Congress approves Bond's language, the senator expects the new administration to use the amendment to "strike the right balance between protecting people and the environment."

"Rather than let the Fish and Wildlife Service dictate national priorities," Bond said, "I believe the elected officials in Congress need to weigh in to protect human safety, property, and jobs."

Bond and other Missourians are siding with the barge industry farmers who rely on

barges for low freight rates. Residents downstream and lawmakers fear the changes would ruin the barge industry, keep farm fields too wet for planting and increase the risk of devastating floods.

Daschle, D-S.D., backs environmentalists worried about the birds and fish as well as the budding tourist industry in Montana and the Dakotas, which needs upriver lakes filled for summer boaters and vacationers.

Daschle said: "If we pass this legislation, we will look at other options, we will not take any specific action right now, but we will not deny, as the House did, the right to continue to move forward."